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In The

Supreme Court of the United States

October Term, 1994

HOBART C. BISHOP, NANCY CONTARDI, MARTIN L. KELLEY, J. E. LALMAN, THOMAS LOVINGGOOD, TERRY MORRIS, DIANE MORRIS, RICHARD MURPHY, HORACE RENSHAW, WENDELL SMITH, and ALBERT M. TIACHE, individually and as class representatives of all others similarly situated,

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, GUY L. CARLTON, as Tax Collector of Collier County, RICHARD S. SHANAHAN, MICHAEL J. VOLPE, PATRICIA ANNE GOODNIGHT, BURT L. SAUNDERS, and MAX A. HASSE, as Commissioners of Collier County, and MARY MORGAN, as Supervisor of Elections of Collier County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

December 30, 1994

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QUESTION PRESENTED FOR REVIEW

When a municipality collects a tax without authority, may a state legislature, consistent with due process of law, respond to a timely refund action simply by passing a law that the revenues of the illegal levy need not be refunded?

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

OPINIONS BELOW

The decision of the Supreme Court of Florida, dated October 5, 1994, denying the petitioners' request for that court to accept jurisdiction of an appeal from the District Court of Appeal for the Second District, State of Florida, is not reported. A copy is reproduced at Appendix A-1 (hereinafter "A-").

The opinion of the District Court of Appeal for the Second District, State of Florida (reproduced at Appendix A-3), issued

on April 15, 1994, is reported at 635 So. 2d 145 (Fla. 2d DCA 1994).

The January 28, 1993 Summary Final Judgment of the Circuit Court for Collier County, State of Florida, and the Amended Final Summary Judgment of that court, dated December 28, 1993, from which an appeal was taken to the District Court of Appeal, are not reported. They are reproduced at Appendix A-7.

Earlier decisions of the District Court of Appeal for the Second District in this action are reported at 573 So. 2d 1054 (Fla. 2d DCA 1991) (A-13), and 588 So. 2d 291 (Fla. 2d DCA 1991) (A-15).

JURISDICTION

The judgment of the District Court of Appeal was dated and entered on April 15, 1994. Thereafter, the petitioners duly requested that the Supreme Court of Florida grant jurisdiction of an appeal from the decision of the District Court of Appeal. On October 5, 1994, Florida's highest court issued an order denying the petition. A-1.

Jurisdiction to review the decision of the District Court of Appeal is conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

This petition, which challenges retroactive taxation by the Florida legislature, invokes the due process clause of the United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. AMEND. XIV.

This petition involves the constitutionality of an April, 1992 amendment (see A-22) to the Local Option Tourist Development Act, F.S. § 125.0104 (A-23), which gave retroactive effect to Ordinance 90-43 of Collier County, Florida. The provisions of the Florida statute and the amendment are lengthy, and their pertinent text is set forth in full in the Appendix. A-22, A-23.

STATEMENT OF THE CASE

Introduction

In this case, the Florida legislature has presumed to overstep the boundaries of permissible retroactive taxation delineated in the due process decisions of this Court. The decision of the Florida court below represents a spreading conflict among state courts over the circumstances under which retroactive tax legislation can pass constitutional muster as "curative" legislation.

In 1990, without authority, Collier County, Florida began to collect a new tax on transient lodging. In late 1991, the Florida courts declared the tax to be unauthorized and invalid. Then, in early 1992, after victims of the unauthorized tax had begun lawsuits for refunds, the Florida legislature responded to the suits by quickly passing a law that specifically authorized Collier County to keep the revenues of the tax, which had been escrowed. It was the legislature's intention to extinguish the claims of the petitioners in mid-suit.

A Florida appellate court has now sustained this legislation. Its decision rests on the proposition that a legislature is always free to authorize the collection of a tax retroactively if it had the authority to enact it in the first place.

This sweeping holding is an affront to constitutional due process and stands as a dangerous precedent. It would leave no limits whatsoever on retroactive legislative approval of illegal tax levies. Moreover, it encourages local officials to levy taxes without regard to their taxing authority, knowing that once significant revenues are collected, political pressure may induce state lawmakers to approve the levy retroactively.

The petitioners respectfully ask this Court to confirm that its holdings in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922), and *Graham v. Goodcell*, 282 U.S. 409, 75 L. Ed. 415 (1931), continue to restrain legislatures from destroying vested claims for recovery of unauthorized taxes.

How the Case Arose

In 1987 the Florida legislature passed a law setting forth certain conditions under which county legislatures could levy taxes on transient lodging. Local Option Tourist Development Act, F.S. § 125.0104 (A-23). Chief among these conditions was that a local "tourist development council" should have prepared and submitted a tourist development plan setting forth projected revenues and how revenues would be spent. F.S. § 125.0104(4)(c) (A-31).

In Collier County, however, the duly appointed tourist development council refused to submit a tourist development

plan. Exercising its statutory prerogative,[1] the council concluded that a tourist development tax was inadvisable and so informed the Collier County Board of Commissioners. *See Freni v. Collier County*, 588 So. 2d 291, 292 (Fla. 2d DCA 1991) (A-15).

Nevertheless, enticed by the revenues a tourist tax would provide, the Board of Commissioners decided to ignore the statutory prerequisites and sallied forth without a plan. In May, 1990 the Board of Commissioners imposed a tourist tax by enacting Collier County Ordinance 90-43. In September, 1990, the County submitted the tax to a voter referendum. The County then began collecting the tax.

Months before the County began collecting the tourist tax, and even before it was submitted to referendum, several hotel operators filed suit seeking injunctive relief and a declaration that the tax was unauthorized and invalid in the absence of a plan from the tourist development council. This litigation resulted in a October, 1991 ruling by the Florida District Court of Appeal for the Second Circuit

-- that the submission of a plan for a tourist development tax was a "mandatory condition precedent" to the valid enactment of a tax,

---

[1]The tourist development council had no obligation to recommend a plan for a tourist tax at all. As the Florida appellate court held,

> the legislature perceived the need to allow a cross-section of citizens of the county, including those affected in the accommodations industry, to assist in determining whether a tourist development tax should be considered by the county and, if so, to assist the county by recommending the specifics involved.

Id. at 294.

-- that Collier County had no authority to enact a transient lodging tax without a plan, and

-- that, therefore, the levy was illegal and its collection should be enjoined.

Freni v. Collier County, 588 So. 2d 291 (Fla. 2d DCA 1991) (A-15 to A-21.)

By this time, about a year's worth of taxes had been collected. They were not, however, spent. Since *Freni* the funds have been voluntarily escrowed by Collier County and held in an interest-bearing account.

In March, 1992, the petitioners filed the refund class actions that are now before this Court. At the behest of Collier County, however, the Florida legislature, in response, hastily passed special legislation (the "Special Legislation") in April, 1992 that authorized Collier County to keep and spend the illegally collected tax revenues. Laws of Florida, ch. 92-204 (April 10, 1992) (see A-22).

The Special Legislation applied to "any county" whose governing body had levied a tourist development tax that had been invalidated because of the failure of a tourist development council to submit a tourist development plan. F.S. § 125.0104(2) (Supp.) (A-22). (As the Florida legislature recognized, Collier County was the only such county. A-52.) It provided that if the county reenacted the tax, and if the tax was approved by county voters in a referendum, the county could spend the illegally collected taxes. The legislative history of the Special Legislation indicates unambiguously that it was proposed in response to the *Freni* decision in order to frustrate the claims asserted in the present lawsuit. A-42; A-45 to A-47; A-49; A-52 to A-53; A-57 to A-60.

Accordingly, the petitioners amended their Complaint to seek, in addition to the original relief, a declaration that the April 10, 1992 Special Legislation was unconstitutional. On August 18, 1992 the Collier County Board of Commissioners availed itself of the Special Legislation and levied another, identical tax, which was approved in a November 3, 1992 referendum.

Decisions of the Florida courts

On a motion by the petitioners, the Florida Circuit Court for Collier County determined that the Special Legislation was unconstitutional and on January 28, 1993, granted them summary judgment on their claims for refunds. A-7.

On appeal, however, the Florida District Court of Appeal for the Second Circuit, which had invalidated the levy in the first place, reversed. In its April 15, 1994 decision, the District Court of Appeal held that the Florida legislature was entitled to "ratify" Collier County's unauthorized tax levy retroactively. A-3.

The petitioners thereafter sought permission to appeal to the Florida Supreme Court, but on October 5, 1994 that court issued an order in which it declined to hear an appeal. A-1.

WHY THE PETITION SHOULD BE GRANTED

When a municipality collects a tax without authority, may a state legislature respond to a timely refund action simply by passing a law that the revenues of the illegal levy need not be refunded? The present petition involves exactly such a case. The petition should be granted so that the Court can clarify the constitutional limits of so-called "curative" tax legislation and the rights of taxpayers with vested claims for refunds.

A. The decision of the Florida court is inconsistent with the decisions of this Court regarding "curative" tax legislation

Seventy-five years ago, in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 338, 66 L. Ed. 647, 648 (1922), this Court held that it was unconstitutional for the Florida legislature to ratify the prior, unauthorized collection of canal tolls from the plaintiffs. It was tantamount, as Justice Holmes wrote, to taxing persons in 1919 for passing through the lock of a canal in 1917. *Id.* at 339, 66 L. Ed. at 649.

In the present case, however, the Florida court has held that this same Florida legislature could ratify the unauthorized collection of a lodging tax from the petitioners in the present case. In its opinion, the Florida court referred to the April 10, 1992 Special Legislation as "a curative act" (A-5), as if it somehow "cured" a mistake by the District Court of Appeal in the 1991 *Freni* decision or by the Board of Commissioners, or rectified an unsuspected flaw in the original legislation.

In labeling the Special Legislation "curative", the Florida court aimed at bringing the case under this Court's holdings that in cases of administrative error, or where legislation is found to contain unintended defects, the mistake or defect can be cured by later legislation that has retroactive effect. *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (literal language of a law creating an estate tax deduction had unexpectedly broad application unintended by Congress); *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 3 L. Ed. 2d 132 (1958) (curative legislation merely implemented what Congress had intended in the first place); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 378, 84 L. Ed. 814, 817 (1940) (defect by federal agency in administration in the handling of a

compensable claim could be corrected by private act of Congress); *Graham v. Goodcell*, 282 U.S. 409, 75 L. Ed. 415 (1931) (taxpayer's obligation became uncollectible due to inadvertent failure of IRS to serve notice and demand for payment); *Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy District*, 739 F.2d 1472, 1477 (10th Cir. 1984) (possible defects in legislature's procedures for creating water conservancy districts were obviated by curative legislation which ensured that original legislative intent would not be frustrated). Legislation that is truly "curative" has survived due process scrutiny even where causes of action are destroyed. *Graham v. Goodcell*, 282 U.S. 409, 429, 75 L. Ed. 415, 440 (1931).

But legislation is not genuinely "curative" if it does not address some mistake or defect. As this Court observed in *Graham*,

> It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute *aptly designed to remedy mistakes and defects in the administration of government* where the remedy can be applied without injustice.

Id. (emphasis supplied).

The sort of "curative" amendments that *can* survive constitutional scrutiny are, moreover, those which *buttress* the original legislative scheme and purpose, not alter or create exceptions to it. *See Springdale Convalescent Center v. Mathews*, 545 F.2d 943 (5th Cir. 1977) (quoting *Federal Housing Administration v. Darlington*, 358 U.S. 84, 91, 3 L. Ed. 2d 132,

138 (1958)); *State of Florida v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981). This Court's recent decision in *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), was such a case. As the Court stated in *Carlton*, "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." 129 L. Ed. 2d at 29. Thus, there was "little doubt that the 1987 amendment to § 2057 was adopted as a curative measure". *Id.* at 28.

The Special Legislation, by contrast, was not "curative" in any respect. It did not cure a drafting or printing error in the original enabling legislation. It did not cure a bureaucrat's error. Nor was it aimed at correcting some perceived judicial misconstruction or misinterpretation of the original legislation. Nor had the Collier County Board of Commissioners made a "mistake". On the contrary, frustrated by what it viewed as obstinacy on the part of the tourist development council, the Board of Commissioners had deliberately and knowingly ignored the limits of its authority.

What the Special Legislation did, therefore, was to pardon rogue legislation by the Collier County Board of Commissioners -- a tax ordinance that flew in the face of the Florida legislature's original legislative policy. In its 1987 legislation, the legislature had "perceived the need to allow a cross-section of citizens of the county, including those affected in the accommodations industry, to assist in determining whether a tourist development tax should be considered by the county and, if so, to assist the county by recommending the specifics involved". *Freni v. Collier County*, 588 So. 2d 291, 294 (Fla. 2d DCA 1991) (A-21). As a matter of policy, the Florida legislature never intended that Collier County or any other county should have authority to impose a tourist tax if the duly constituted tourist development council

deemed one inadvisable. *Id.* at 293-94 (A-21). The legislative scheme, instead, set up tourist development councils as buffers and brakes on local county governments that might too readily seize upon a new but perhaps undesirable revenue source.

No reason has ever been suggested why this policy was inappropriate for Collier County -- why Collier County, alone in all of Florida, should have been excused from obtaining a recommendation from its tourist development council. Far from buttressing or, at the very least, complementing the original legislative scheme, the 1992 Special Legislation represented a 180-degree reversal of legislative policy.

"Curative" legislation typically makes an adjustment or correction in prior legislation. *E.g.*, *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (curative legislation amending the statutory rules governing a certain estate tax deduction). In the present case, however, the Special Legislation was so far from being "curative" that it made no prospective changes in the statute at all. Counties are *still* required to obtain tourist development plans from tourist development councils before they may implement transient lodging taxes. The only change in the law was to state that even though Collier County had not complied with the law, it could keep the taxes it had illegally collected under its 1990 ordinance.

The Florida court characterized the absence of a recommendation from Collier County's tourist development council as a "procedural defect" (A-6) (*cf. Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 378, 84 L. Ed. 814, 817 (1940)). This characterization was supremely inaccurate, as the history of the tax shows. The absence of a recommendation from the Collier County tourist development council was no oversight (or "unanticipated procedural fluke", as characterized by the County below). On the contrary, the Board of Commissioners actually

sought such a recommendation, but were thwarted when the council refused. They continued on their course by submitting the tax to Collier County voters even after the hoteliers commenced a lawsuit pointing out the patent lack of authority for the tax.

The Board of Commissioners could not have "corrected" the deficiency if it had wanted to. It proceeded without a recommendation not because it made a "mistake", but because it deliberately decided to ignore its lack of authority.

In summary, there was no defect or mistake. The original enabling legislation expressed exactly what the legislature intended, and the Collier County Board of Commissioners understood it perfectly well. The Board simply decided to take the law into its own hands. The absence of any "curative" features to the Special Legislation purporting to "ratify" the Collier County ordinance robs it of any colorable claim to constitutionality.

B. State courts are divided on the issue of when "curative" legislation is and is not constitutionally permissible

The constitutionality of curative retroactive tax legislation that is not truly "curative" is a recurring issue on which state court decisions are divided.

One such decision is *State ex rel. Emmerik v. Janklow*, 304 N.W.2d 700 (1981), which involved a tax increase that South Dakota officials began to collect in 1969. In 1980 the increase was determined by the South Dakota Supreme Court to have been unauthorized by 1969 legislation, and in 1981 the South Dakota legislature authorized the increase retroactively (12 years!) to 1969, thereby frustrating a class action refund suit. The South

Dakota Supreme Court held that the 1981 legislation did not violate due process because it was a "curative" act. *Id.*

This Court dismissed an appeal from the state court decision (*Emmerik v. Janklow*, 454 U.S. 1131, 71 L. Ed. 2d 285 (1982)), but Justice White, joined by Justice Blackmun, argued in dissent that the issue should be resolved:

> The difficulty in discerning the difference between permissible curative legislation and unconstitutionally retroactive legislation is apparent from an examination of our cases.

71 L. Ed. 2d at 285. Justice White discussed this Court's decisions in *United States v. Heinszen*, 206 U.S. 370, 51 L. Ed. 1098 (1907), in which genuinely curative legislation was sustained, and *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922), where legislation similar to that in the present case was struck down. Justice White commented:

> Heinszen and Forbes appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively. However, Heinszen and Forbes offer little guidance as to whether a retroactive tax increase constitutes a change in legislative policy.

71 L. Ed. 2d at 286. He noted that the South Dakota court's decision in *Emmerik* was in apparent conflict with a decision of the Maryland Court of Appeals (*Washington National Arena Limited Partnership v. Treasurer*, 287 Md. 38, 410 A.2d 1060 (1980), *cert. denied*, 449 U.S. 834, 66 L. Ed. 2d 40 (1980)), and concluded:

> Just as it is clear that "the principle of curative legislation could, if carried too far, encourage irresponsible official conduct," [citing Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Calif. L. Rev. 216, 239 (1960)] it is also clear that it is this Court's duty to define the boundary between permissible and impermissible retroactive tax increases.

71 L. Ed. 2d at 286.

It is respectfully submitted that the decision of the Florida court below widens the split of authority on this significant issue of constitutional law, which should be resolved by this Court.

C. The Florida court's holding that a tax may be imposed retroactively whenever there was authority to approve it in the first place represents a dangerous precedent which the Court should repudiate

The District Court of Appeal upheld the Special Legislation on the ground that since the Florida legislature had the authority to authorize the tourist tax in the first instance, it was free to ratify the invalidated tax after the fact. 635 So. 23 145, 146 (Fla. 2d DCA 1994) (A-5).

Under the umbrella of this broad premise, *any* illegal tax levy could be authorized after the fact. It is surely difficult to imagine an instance where it could not. The taxing powers of the United States Congress are so comprehensive that the Internal Revenue Service could, hypothetically, begin collecting taxes on almost anything, trusting in Congress to later confer retroactive taxing authority so as avoid refunds. The taxing powers of state legislatures are similarly broad.

The holding of the District Court of Appeal is particularly disturbing because it purports to rely on this Court's 88-year old decision in *United States v. Heinszen*, 206 U.S. 370, 51 L. Ed. 1098 (1907). *Heinszen* represents, at most, the proposition that retroactive tax legislation is permissible to cure mistakes and irregularities. *Emmerik v. Janklow*, 454 U.S. 1131, 71 L. Ed. 2d 285 (1982) (White, J., dissenting from dismissal of appeal). *Heinszen* was given a narrow construction by this Court in *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922). Later, in *Graham v. Goodcell*, 282 U.S. 409, 429, 75 L. Ed. 415, 440 (1931), this Court continued to limit and distinguish *Heinszen*, going so far as to say that in *Heinszen* "the principle of ratification was not necessarily involved" at all. *Id.* In short, *Heinszen* has little, if any, precedential value for this case.

The holding of the District Court of Appeal is also troubling, however, because of the way it distorts the principles that emerge from *Heinszen* and *Forbes*. Citing *Heinszen*, the court stated: "Where the authority exists in the first instance to confer the taxing power, the tax thereafter imposed is not void." 635 So. 23 145, 146 (Fla. 2d DCA 1994) (A-5).

The court overlooked the logical consequence of its premise, which was that since Collier County did *not* have authority to enact a tourist tax, as it had held in *Freni*, the tax it imposed *was* void and could *not* be ratified. Instead, the court went on to assert that since the Florida *legislature* had the authority in the first instance to impose tourist taxes, the tax illegally enacted by the *County* could be ratified by the legislature. This, it is respectfully submitted, is exactly the opposite of what this Court said in its earlier decisions. In *Forbes*, the Court explained *Heinszen* as follows:

> The argument that prevailed below was based on the supposed analogy of United States v. Heinszen . . . , which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time, the enactment would have been within its power. [Citations omitted.] But generally, ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act.

Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 258 U.S. 338, 339, 66 L. Ed. 647, 648 (1922).

The reasoning of *Forbes* leads to only one conclusion. The Florida legislature could not constitutionally ratify the unauthorized 1990 levy of taxes because the legislature could not, in 1992, have constitutionally passed a retroactive tax on transactions that had already taken place in 1990.

The petitioners respectfully urge that the Court grant certiorari to clarify that *Heinszen* does not confer power on taxing authorities and legislatures, unconstrained by constitutional due process, to impose retroactive taxes in the guise of ratifying illegal and unauthorized tax levies.

D. The decision of the Florida court allows a legislature to extinguish rights to recover taxes levied without legislative authority in violation of due process of law

The decision of the Florida court below utterly ignores *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 66 L. Ed. 647 (1922),

and *Graham v. Goodcell*, 282 U.S. 409, 75 L. Ed. 415 (1931), which petitioners had urged as controlling. Those decisions established that a taxpayer's right to a refund of an illegal and unauthorized tax levy cannot, consistent with due process, be extinguished by later legislation. Ironically, the only decision of this Court cited at all by the Florida court was *United States v. Heinszen*, 206 U.S. 370, 51 L. Ed. 1098 (1907) -- which this Court distinguished and limited in *Forbes* and *Graham*.

The circumstances of *Forbes* are analogous in all respects to those in the present case. In 1917, the Everglades Drainage District Board of Commissioners imposed a toll on boats passing through a lock, including the plaintiff's. The Board of Commissioners argued at length (as did the County here in *Freni*) that it *did* have authority to impose a toll. The Florida courts determined, however, that the toll was unauthorized. "A careful examination of the acts of the Legislature does not reveal any express power or authority granted the defendant in error to levy a toll upon boats passing through the lock in question." *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 77 Fla. 742, 82 So. 346, 351 (1919).[2]

The Florida Supreme Court's decision established Forbes Pioneer Boat Line's right to recover the illegally exacted canal lock tax, just as the *Freni* decision established the petitioners' right to recover illegally exacted tourist taxes. Both decisions turned on the conclusion that there was no legislative authority for the taxes in question. Moreover, the decision left the Boat

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[2]In the Florida court, the County attempted to distinguish *Forbes* as a case in which "a tax was levied without any enabling legislation whatsoever." But the decision of the Florida Supreme Court cited in the text above indicates that the legislature *had* conferred numerous powers on the district, from which the district was able to argue that the power to collect tolls was implied.

Line in exactly the same position as the petitioners in this action: with a judicial determination that a tax was unauthorized and a right of recovery that had not yet been reduced to a judgment.

What happened then in *Forbes* was echoed precisely by the events in 1992 after the *Freni* decision. Just as it responded to the Florida Supreme Court's decision in *Forbes* by passing legislation purporting to validate the collection of the canal lock tax (see *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338, 338, 66 L. Ed. 647, 648 (1922))[3] the Florida legislature responded to the Circuit Court's ruling in favor of the petitioners in *Freni* by enacting the legislation at issue on this appeal. As in the present case, the taxpayer was then compelled to litigate the validity of purported "curative" legislation.

In 1920 the Florida Supreme Court held (in its second decision in *Forbes*) that the legislative attempt to ratify the illegal collection of tolls was permissible.[4] On further appeal, however, this Court reversed and held that the Boat Line could not constitutionally be deprived of its right to recoup the unauthorized tolls. The nub of the issue was that the refund claim could not simply be abolished, any more than any other creditor's claim:

> Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is

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[3]Indeed, the purported "curative" legislation was promptly passed on the same day that the Florida Supreme Court decision issued its decision. *Id.* at 338, 66 L. Ed. at 648.

[4]*Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 80 Fla. 252, 86 So. 199, 201 (1920).

> when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation.

258 U.S. at 340, 66 L. Ed. at 649. Persons who had patronized the lock before the toll was authorized could not be made liable for a toll after the fact -- not even through the device of "curative" or "ratifying" legislation:

> [G]enerally, ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. . . . If we apply that principle this statute is invalid. For if the legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

Id. at 339, 66 L. Ed. at 649.

The circumstances of *Forbes* are indistinguishable in every respect from those now before this Court: (1) a tax imposed without proper authority; (2) a lawsuit yielding a judicial determination that the tax was unauthorized; (3) commencement of a suit to recover the illegal tax; and (4) a legislative attempt to validate the collection of the tax retroactively. In 1919 it was too late for the legislature to impose a tax on the passage of a boat through a canal lock in 1917, consistently with constitutional due process. Similarly, in April, 1992 it was too late for the legislature to impose a tax on lodging transactions completed in 1990 and 1991.

Since *Forbes* and *Graham* were decided, the retroactive taxation cases that have come before this Court have typically involved retroactive changes in tax rates. These have been upheld on the ground that Congress traditionally and customarily makes changes to the tax laws retroactive for a limited period of time prior to the date of actual enactment, and that taxpayers have no vested rights in existing tax rates. *E.g.*, *United States v. Darusmont*, 449 U.S. 292, 66 L. Ed. 2d 513 (1981); *Welch v. Henry*, 305 U.S. 134, 83 L. Ed. 87 (1938); *Milliken v. United States*, 283 U.S. 15, 75 L. Ed. 809 (1931).

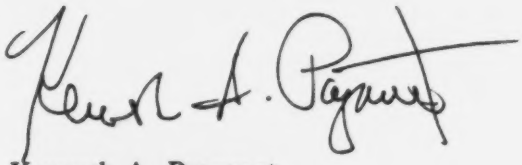
Nevertheless, as the Court noted in *United States v. Hemme*, 476 U.S. 558, 568, 90 L. Ed. 2d 538, 548 (1986), a "wholly new tax," as distinguished from changes to existing tax provisions, generally may not be imposed retroactively. *Accord*, *United States v. Carlton*, 114 S. Ct. 2018, 129 L. Ed. 2d 22, 31 (1994) ("[I]t is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them." *Id.* at 33 (O'Connor, J., concurring)). And as Justice Holmes observed in *Forbes*, the ratification of the collection of a tax that was illegal and unauthorized when it was collected is no different from the retroactive levy of a new tax.

The present case shows that the temptation for legislatures to simply retain revenues of illegal and unauthorized taxes is as great now as it was in 1920 when *Forbes* arose. The petitioners respectfully urge that the Court revisit *Forbes* and reaffirm its holding that new taxes may not be retroactively imposed, vested claims for refunds may not be extinguished, and unauthorized tax levies must be refunded.

CONCLUSION

For all the foregoing reasons, the petitioners respectfully urge that the petition for certiorari be granted and that the case be set down for argument.

December 30, 1994 Respectfully submitted,



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